Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JIMMY HICKS, III, & LaTONYA MOORE,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DeGUERIN & DICKSON

Dick DeGuerin
Chris Flood
1018 Preston, 7th Floor
Houston, Texas 77002
(713) 223-5959

Attorneys for Petitioner

Alpha Law Brief Co. • 6113 Aletha Lane • Houston, Texas 77081 (713)981-9000

QUESTIONS PRESENTED

1. WHETHER 49 U.S.C. §1472(j) VIOLATES THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BY CRIMINALIZING PROTECTED SPEECH.

2. WHETHER 49 U.S.C. §1472(j) VIOLATES THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN APPLIED TO THE PROFANITY USED BY PETITIONERS IN THIS CASE.

3. WHETHER 49 U.S.C. §1472(j) IS A SPECIFIC INTENT AS OPPOSED TO A GENERAL INTENT CRIME.

LIST OF ALL PARTIES[1]

1. Jimmy Hicks, III
2. LaTonya Moore
3. Jerry Canty
4. United States of America

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[1]Jerry Canty was a Co-Defendant and Co-Appellant in the courts below. Though perhaps not framing the First Amendment issues as Petitioners have, Canty filed a Petition for Writ of Certiorari before this Court. Only Petitioners Hicks and Moore bring forth the First Amendment issue.

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OCTOBER TERM 1992

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JIMMY HICKS, III, & LaTONYA MOORE
Petitioners,

V.

UNITED STATES OF AMERICA,
Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

Petitioners Jimmy Hicks, III, and LaTonya Moore, praying that Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued on December 23, 1992, files this their Petition for Writ of Certiorari, saying more particularly in support thereof as follows:

OPINIONS AND JUDGMENTS ISSUED IN THE COURTS BELOW

On December 23, 1992, the United States Court of Appeals for the Fifth Circuit rendered its Opinion affirming the judgment of conviction in the case styled **United States of America v. Jimmy Hicks, III, Jerry Canty, LaTonya Moore**, No. 91-6272. A copy of that Opinion is attached hereto as "Appendix A." A copy of the

judgment and sentence of the District Court is attached hereto as "Appendix B."

JURISDICTION

The judgment of the Court below (Appendix A, *infra*) was entered on December 23, 1992. Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The Court below entered an Order denying the Petition for Rehearing on January 21, 1993. A copy of the Order denying the Petition for Rehearing and Suggestion for Rehearing En Banc is attached hereto as "Appendix C." This Petition is filed within ninety days of that date. The jurisdiction of this Court to review the judgment on Petition for Certiorari rests upon §1254(1) of the Judicial Code [28 U.S.C. §1254(1)] and Supreme Court Rule 10.1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

49 U.S.C. §1472(j) states:

> "(j): **Interference with flight crew members or flight attendants**. Whoever, while aboard an aircraft within the special aircraft jurisdiction of the United States, assaults, intimidates, or threatens any flight crew member or flight attendant (including any steward or stewardess) of such aircraft, so as to interfere with the performance by such member or attendant of his duties or lessen the ability of such member or attendant to perform his duty, shall be fined not more than $10,000.00 or imprisoned not more than twenty years, or both. Wherever in the commission of any such act uses a deadly or dangerous weapon shall be imprisoned for any term of years or for life."

49 U.S.C. §1472(k)(1) states:

> "(k)(1): **Certain crimes aboard aircraft in flight.** Whoever, while aboard an aircraft within the special aircraft jurisdiction of the United States, commits an a ct which, if committed within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of Title 18, would be in violation of section 113, 114, 661, 662, 1111, 1112, 1113, 2031, 2032, or 2111 of such Title 18 shall be punished as provided therein."

28 U.S.C. §1291 says:

> "The Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where direct review may be had in the Supreme Court. The jurisdiction of the United States Supreme Court for the Federal Circuit shall be limited to the jurisdiction described in §1292 (c) and (d) and 1295 of this Title [28 U.S.C. §§1292(c), (d), 1295].

STATEMENT OF THE CASE

A. **Course of Proceedings.**

Petitioners Jimmy Hicks, III, and LaTonya Moore were charged by indictment with a violation of Title 49 U.S.C. §1472(j). The indictment charged that on or about July 23, 1990, while aboard an aircraft within the special aircraft jurisdiction of the United States, to wit: Continental Airlines Flight 1919 from Montego Bay, Jamaica, to Houston, Texas, and within the jurisdiction of this Court, Jimmy Hicks, III, LaTonya Moore, Jerry Canty, and Billy Kinser, each aiding and abetting one another, did knowingly and unlawfully assault, intimidate, and threaten flight attendants and crew members, so as to interfere with the performance by those attendants and members of their duties and lessen the ability of those attendants and members to perform their duties.

On August 27, 1991, a jury trial ensued with a jury verdict of guilty as to all Defendants on September 6, 1991.

On November 14, 1991, the Court imposed a sentence of 14 months imprisonment in the Bureau of Prisons to be followed by three years supervised release as to Petitioner Hicks and eight months imprisonment to be followed by three years supervised release as to Petitioner Moore. Petitioners were also ordered to pay restitution in the amount of $1,871.35 to Continental Airlines and to pay a $50.00 special assessment. Petitioners thereafter timely filed Notice of Appeal. A Panel of the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court on December 23, 1992, in an Opinion to be published in **United States of America v. Jimmy Hicks, III, Jerry Canty, and LaTonya Moore**, No. 91-6272.

STATEMENT OF FACTS

On July 23, 1990, Jimmy Hicks, III, LaTonya Moore, and Jerry Canty were passengers aboard Continental Airlines Flight 1919 from Montego Bay, Jamaica to Houston, Texas. Hicks boarded the flight carrying a portable stereo system consisting of an AM-FM radio, tape player, and speakers. Immediately after boarding and taking his seat, Hicks discovered his seat was malfunctioning and requested that Melissa Bott, the aircraft flight service manager, find an alternative seat for him and his travelling companion, Moore. After Bott declined to do so, Hicks expressed his displeasure with profanity. Prior to takeoff, Moore turned on the portable stereo system at which time she was approached by Bott who requested Moore to turn the system off. Moore complied with the flight service manager's request.

Following takeoff, one of the Petitioners, Hicks or Moore, turned the tape playing component of the stereo system on and was immediately approached by one of the

flight attendants, Eileen Dubois. Dubois informed Hicks of airline policy which required passengers to listen to tape players through headphones to which Hicks responded that the music was not bothering anyone. Dubois proceeded to the front of the airplane and informed the flight service manager, Bott, who then apprised the Captain of the situation.

Much of the record is then devoted to the malfunctioning of the aircraft's navigational equipment which the pilot conclusively attributes to the playing of the portable stereo system by Petitioners Hicks and Moore, but was inconclusively established at trial.

While Bott was in the cockpit with the Captain, another flight attendant, Carol McWilliams, approached Petitioners and requested Hicks not to play the stereo system. Hicks responded to McWilliams with profanity. Meanwhile, Bott had exited the cockpit and approached Hicks and Moore requesting them to turn the portable stereo system over to her. In refusing to do so, both Hicks and Moore directed profanity at Bott, but did not physically or verbally threaten her or any other airline employee.

Shortly thereafter, Second Officer Jim McKelvian confronted Petitioners and asked them to relinquish their portable stereo system. Hicks again responded with profanity but never physically or verbally threatened the officer. After another verbal confrontation between Bott and Moore, which included profanity, the Captain diverted the aircraft's course to Cancun, Mexico, and placed Petitioners and Co-Appellant Jerry Canty into the custody of the Mexican Federal Police.

It is undisputed that throughout the flight neither Petitioner committed assault or battery, or verbally threatened any Continental flight crew member with physical harm. Instead, the record reflects that Petitioners only directed profanity towards flight crew members and used profane emotive responses.

REASONS FOR GRANTING THE PETITION

I. 49 U.S.C. §1472(j) violates the First Amendment to the United States Constitution by criminalizing constitutionally protected free speech.

This Court has always used great scrutiny in deciding whether a state or federal statute infringes upon the free speech clause of the First Amendment. *See generally*, **Dombrowski v. Psister**, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); **City of Houston, Texas v. Hill**, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). A review of the statute in question reveals, like in **Hill**, *supra*, that the portion of the statute that deals potentially with protected language is separate from the portion that deals with core criminal conduct. As in **Hill**, *supra*, the portion of the statute which makes it an offense to assault or threaten any flight crew member is preempted by 49 U.S.C. §1472(k)(1) which makes it an offense to commit certain enumerated Title 18 offenses, such as assault, while aboard an aircraft in flight. Accordingly, the enforceable portion of the ordinance makes it unlawful for anyone while aboard an aircraft to intimidate any flight crew member or flight attendant, thereby prohibiting the use of profanity which might intimidate a flight crew member or flight attendant. This type of profanity directed at flight crew members or flight attendants is protected by the First Amendment.

In **Lewis v. City of New Orleans**, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974), this Court found unconstitutional a municipal ordinance which made it a crime for "any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty." *Id.* at 132, 94 S.Ct. at 9772. In finding the ordinance facially overbroad, this Court was

impressed by the fact that the ordinance "punished only spoken words" and was not limited in scope to "fighting words" which "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 133, 94 S.Ct. at 972, quoting **Gooding v. Wilson**, 405 U.S. 518, 525, 92 S.Ct. 1103, 1107, 31 L.Ed.2d 408 (1972). Justice Powell, in a concurring opinion, suggested that the "fighting words" exception recognized in **Chaplinsky v. New Hampshire**, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), might even require a narrower application in cases involving police officers because "a properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'" 415 U.S. at 135, 94 S.Ct. at 973. In **City of Houston, Texas v. Hill**, this Court was confronted with Code of Ordinances, City of Houston, Texas, §34-11(a) which read in pertinent part:

> "(a) It shall be unlawful for any person to assault, strike, or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest."

As in the present case, this Court found that the above-statute was not limited to "fighting words" but prohibited speech which in any manner interrupted an officer. Specifically, this Court held:

> "The Constitution does not allow such speech to be made a crime. (footnote omitted). The freedom of individuals to verbally oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." (footnote omitted).

In the present case, the failure of 49 U.S.C. §1472(j) to properly proscribe, with sufficient narrow tailoring, only "fighting words" as defined by this Court in **Chaplinsky v. New Hampshire**, *supra*, makes the provision susceptible to regular application to protected expressions. Consequently, the statute is substantially overbroad and fails to provide the "breathing space" that "First Amendment freedoms need...to survive." **N.A.A.C.P. v. Button**, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963).

49 U.S.C. §1472(j) infringes upon the First Amendment to the United States Constitution by criminalizing the profanity used by the Petitioners.

As stated above, 49 U.S.C. §1472(j) can be violated if an individual intimidates a flight crew member while simply engaging in protected speech such as profanity or vulgarity. This type of content-based regulation of speech was struck down by this Court in **R.A.V. v. City of St. Paul, Minnesota**, 505 U.S. ___, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). As Justice Scalia noted in the Opinion of the Court, even though the Minnesota Supreme Court's authoritative statements that the terms in the ordinance reached only those expressions that constitute "fighting words," the ordinance was unconstitutional in that it prohibited speech solely on the basis of the subject of the speech addressed. *Id.* at 2542. In other words, this Court was bound by the state court decisions which held that the statute only prohibited unprotected speech, but struck down the statute as unconstitutional because the ordinance made it unlawful to use such speech when directed towards specific persons or subjects.

In the present case, a similar situation exists because profanity and vulgarity, according to this Court's decisions in **Chaplinsky**, *supra*, and **Lewis**, *supra*, constitute protected speech. However, if the same speech is directed toward a

flight crew member or flight attendant, it becomes criminalized because of the subject that is addressed. In **R.A.V. v. City of St. Paul, Minnesota**, *supra*, Justice Scalia wrote:

> "Applying these principals to the St. Paul ordinance, we conclude that even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. Although the phrase in the ordinance 'arouses anger, alarm, or resentment in others' has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to 'fighting words,' the remaining, unmodified terms make clear that the ordinance applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion, or gender.' Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas - to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality - are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." (citations omitted).

That same logic and this Court's prior decisions in **Lewis**, *supra*, and **City of Houston v. Hill**, *supra*, makes an ordinance unconstitutional if it: (1) makes the utterance of constitutionally protected speech, that is profanity or

vulgarity, unlawful; or (2) makes proscribable speech, that is "fighting words," unlawful when directed at limited subjects.

In the present case, Petitioners engaged in protected speech, profanity and vulgarity, but because they directed such speech towards flight crew members or flight attendants, such speech became criminalized. The failure of 49 U.S.C. §1472(j) to require more than the mere utterance of protected speech to constitute a violation makes the statute unconstitutionally overbroad as applied to the facts in this case.

This Court should decide whether 49 U.S.C. §1472(j) is a general intent versus a specific intent crime.

The Court of Appeals upheld the trial court's instructions to the jury that allowed Petitioners to be found guilty of violating 49 U.S.C. §1472(j) if the jury found that Petitioners "knowingly" intimidated the crew members, but did not require that the jury find that Petitioners knowingly intimidated the crew members with the specific intent to interfere with the crew members' duties. As the charge read, it only required a specific intent to intimidate, not a specific intent to interfere.

The only court to address this issue was the Ninth Circuit in **United States v. Meeker**, 527 F.2d 12, 14 (9th Cir. 1975). In **Meeker**, *supra*, the Court held that 1472(j) is a general intent crime and reasoned that such finding is in harmony with the statutory purpose of safeguarding flight personnel from any statutorily described acts which would interfere with their duties. *Id.* at 14. In this case, the Court of Appeals below followed **Meeker** and went on further to hold:

> "Whether a passenger specifically intends to interfere with those duties is irrelevant. General intent is all that Congress required, as is evident from the plain language of the statute -- in particular, Congress' failure to use terms such as 'willfully,' 'intentionally,' or 'knowingly' and Congress' selection of the phrase 'so as to interfere.'" (citations omitted).

A closer review of 49 U.S.C. §1472 as a whole reveals that §1472(k)(1) makes it an offense for an individual to perform acts which would constitute an offense under specific sections of Title 18, while on board an aircraft in flight. As stated before, one of these enumerated offenses includes the offense of assault. Therefore, if an individual intentionally assaults another while on board an aircraft, he should be punished for violating 18 U.S.C. §113 or 114, whatever the case may be, in accordance with the dictates of 49 U.S.C. §1472(k)(1). However, if one assaults a crew member with the intent to interfere with their duties, then that person has committed the more serious offense of violating 49 U.S.C. §1472(j). It should be noted, that 18 U.S.C. §113(b) and (e) provides for punishment up to six months and three months imprisonment respectively, but if the same acts were performed upon a flight crew member with the intent to interfere with their duty, it would subject the offender to a term of not more than twenty years. When considering 49 U.S.C. §1472 as a whole, it is apparent that there is a clear distinction between simply assaulting a flight

crew member and assaulting a flight crew member "so as to interfere with the performance of such member or attendant of his duties...."

In **Liparota v. United States**, 471 U.S. 14, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985), this Court addressed the problems associated with the failure of requiring a *mens rea* to commit an offense. Justice Brennan, citing **Morissette v. United States**, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), wrote:

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief and freedom of the human will and the consequent ability and duty of the normal individual to chose between good and evil."

Justice Brennan went on to say:

> "Thus, in **United States v. United States Gypsum Co.**, 438 U.S. 422, 438, 98 S.Ct. 2864, 2874, 57 L.Ed.2d 854 (1978), we noted that 'certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement' and that criminal offenses requiring no *mens rea* have a 'generally disfavored status.'" **Liparota**, *supra*, at 426, 105 S.Ct. 2088.

The idea that 49 U.S.C. §1472(j) should be a specific intent crime and not simply a general intent crime was first approached by Senator Engle, when discussing the

subsequent House Amendment to 49 U.S.C. §1472 which made it applicable to flight attendants as well as cockpit crew:

> "I believe we were right in the first instance in not applying to stewardesses the provision which applied to flight crew members who were actually employed in duties directly involving the safety of the aircraft. But the crime having to do with interference with stewardesses may be prosecuted either under §1 or the other section. We assume that, if it was a minor crime, *like that of a drunk quarreling with a stewardess over whether or not to keep his bottle, he would not be charged under the major punishment portion of the Bill, but under the minor provision, which would not carry the heavy penalty.*" 107 Cong. Rec. 17170 (August 28, 1961).

In this case, Petitioners simply quarreled with Bott, a flight crew member, about whether or not they should be able to keep a portable stereo system. There was no intent to interfere with the flight crew member's duties and therefore, as Sen. Engle suggested, they should be punished under the minor provisions of §1472 and not the provision which carries the heavier penalty.

CONCLUSION

The judgment below cannot be the law. It denies one the right to engage in free speech protected by the First Amendment to the United States Constitution and, more importantly, disallows the use of profanity when directed specifically at a flight crew member. Furthermore, the judgment below subjects the citizenry to an overly sensitive flight crew member who may become 'intimidated' at the slightest use of profanity. Finally, the failure to require both a specific intent to intimidate and interfere with the flight crew or flight attendant's duties results in a more serious punishment being available for the same actions, dictated only by whatever charge the prosecuting authority chooses to pursue. For these reasons, Petitioners respectfully pray that this Honorable Court will grant this Application for Writ of Certiorari and that they will be given the opportunity to further brief and argue the issues raised herein.

Respectfully submitted,

DeGUERIN & DICKSON

Dick DeGuerin
1018 Preston, 7th Floor
Houston, Texas 77002
(713) 223-5959
Federal Admissions No. 6204

Chris Flood
1018 Preston, 7th Floor
Houston, Texas 77002
(713) 223-5959
Federal Admissions No. 9929

Attorneys for Petitioners

APPENDIX A

U.S. COURT OF APPEALS
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-6272

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIMMY HICKS, JERRY CANTY,
and LATONYA MOORE,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas

Before KING, JOHNSON and DUHÉ, Circuit Judges.

KING, Circuit Judge:

Appellants, passengers aboard a commercial airline flight from Jamaica to Houston, were convicted of

"intimidating: members of the flight crew "so as to interfere with" the performance of their duties, in violation of 49 U.S.C. § 1472(j). Appellants raise a number of claims on appeal, most notably a first amendment challenge to § 1472(j). After carefully considering all their claims, we affirm.

Appellants Jimmy Hicks and Latonya Moore, who were traveling companions, boarded Continental Airlines Flight 1919 in Montego Bay, Jamaica on July 23, 1991. The flights, carrying approximately 145 passengers, was bound for Houston. Hicks carried on board a "boombox," a portable stereo system consisting of a AM-PM radio, a tape player, and speakers. Immediately after boarding and taking a seat, Hicks discovered that his seat was malfunctioning, which prevented him from sitting next to Moore. Hicks subsequently requested that Melissa Bott, the aircraft's flight service manager, find alternative seating for them. Bott responded that she could do so only after everyone with pre-assigned seating had claimed their seats. Hicks expressed his displeasure with Bott's response by using the expletive "shit". Rather than following Bott's instructions, Hicks immediately proceeded to procure alternative seating by offering another passenger free drinks in exchange for his seat. Also, during this time, Bott observed Hicks remove a newspaper from another passenger's lap. The passenger -- a total stranger to Hicks -- protested that he had not yet finished reading the paper. Hicks angrily threw the paper back at the other passenger. Bott said that she was "alarm[ed] by Hicks' extreme arrogance.

Shortly thereafter, still prior to take-off, Moore turned on the radio component of the boombox. Bott testified that the radio was playing "loud[ly]. Bott immediately approached Moore and informed her that Federal Aviation Administration (FAA) regulations

prohibited the playing of radios on board aircraft because radio-playing interferes with the proper functioning of a plant's navigational equipment. Moore agreed to turn the radio off -- but only for the time being, as later events would prove.

Following take-off, one of the flight attendants, Eileen DuBois, heard loud music playing on the aircraft; she noticed that Hicks and Moore once again were playing their boombox. After DuBois approached Hicks, he claimed that he was playing an audio tape rather than the radio. DuBois informed him that Continental policy required that passengers may only listen to tape players through headphones. Hicks angrily refused to turn off the machine, claiming that all of the passengers seated within listening range desired to hear his tape. Hicks' claim was in fact somewhat unfounded.[1] Rather than confronting Hicks any further, DuBois believed that the wisest course was to inform her superior, Melissa Bott, of Hicks' refusal to use headphones. Bott subsequently entered the cockpit to apprise the captain of the situation.

The captain instructed Bott to order Hicks and Moore to discontinue use of the boombox. The captain stated that he believed that the playing of the radio was the cause of the malfunctioning of aircraft's navigational equipment during the plane's ascension to cruising altitude. Prior to Bott's entry into the cockpit, the captain and his first and second officers had attempted in vain to determine why the navigational equipment had failed, including running internal tests on the equipment, contacting a nearby American Airlines aircraft to inquire if it was experiencing similar difficulties, and contacting the airport in Jamaica to see if the

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1. Sibok Kim, his wife, and his two children were seated two rows immediately behind Hicks. Kim testified that neither Hicks nor Moore ever asked the Kim family whether they wished to hear the music.

malfunctioning was the result of a problem in the air traffic control tower. By the time Bott informed him of appellants' radio-playing, the captain had already concluded that the source of the problem was within the aircraft, although not equipment-related. Bott's report about the boombox strongly suggested that Hicks and Moore had continued to pay the radio after being instructed not to do so.

Before Bott returned to the portion of the aircraft occupied by Hicks and Moore, another flight attendant, Carol McWilliams, approached them after other passengers complained about the boombox. McWilliams informed Hicks that he must not play the radio -- as it would interfere with the plane's navigational equipment -- and that if he played a tape he must use headphones. Hicks responded that McWilliams was "the third bitch" who had complained about the boombox. He also angrily ordered her to serve him a drink. At that point, Moore interjected that all of the passengers around them wished to hear the boombox. Like DuBois before her, McWilliams realized that Hicks and Moore were too obstinate to reason with; the flight attendant thus went to the front of the aircraft to inform Bott. As McWilliams walked up the aisle, she met Bott, who was coming from the cockpit. McWilliams informed Bott of Hicks and Moore's continued noncompliance.

Bott again approached Hicks and Moore. She requested that they should turn the boombox over to her for the remainder of the flight. Hicks responded that the "f---ing radio was going to stay on" and that he would not relinquish it to anyone. In a confrontational manner, he then passed it to Moore and stated "if you want the radio, you need to get it from her." Moore also refused to give up the boombox and cursed at Bott. Moore firmly stated that "the radio is going to stay on," and ordered Ms. Bott to get her "ass[] back there and do [her] job to get them something to eat and

drink." She also ordered the flight attendants to "quit bothering" them. At this point, Appellant Canty, who was seated nearby but who was not a traveling companion of Hicks and Moore, intervened and began to curse at Bott and McWilliams. No member of the flight crew had heretofore directed any comment to Canty. Bott stated that she asked appellants not to use profanity, as young children were seated nearby. Bott also stated that she began to feel "frightened" by appellants' increasingly angry obstinacy, although all the while she maintained her composure.

Bott returned to the cockpit to inform the captain of the latest developments in the escalating disturbance. At that point, the captain instructed his second officer to attempt to retrieve the boombox. In the meantime, McWilliams had another encounter with Hicks and Moore, although this time Canty again vocalized his own angry sentiments to the flight attendant. McWilliams directed appellants' attention to a Continental Airlines flight magazine wherein the proscription on radio playing and the requirement that a tape player could be played only with headphones were clearly set forth. Canty angrily responded that McWilliams should "get out of [his] face."

Shortly thereafter, the second officer, Jim McKelvain, arrived and informed Hicks and Moore that their radio had interfered with the aircraft's navigational equipment. He asked them to relinquish the boombox. Hicks told the second officer to get f---ed" and that Hicks would rather pay a fine than cooperate. The second officer described Hicks as totally "uncooperative," even after being told that he was violating federal law. As he had done when confronted with Bott's demand to turn over the boombox, Hicks proceeded to pass it to Moore. Moore refused to hand it over to the second officer, even after the officer stated that rather than

confiscating it, he would merely place it in the overhead compartment located above Hicks and Moore.

Hicks then instructed the second officer to get his "mother-f---ing ass to the cockpit" and fly the plane. The second officer returned to the cockpit and informed the captain of his belief that physical force would be required to retrieve the boombox. Meanwhile, Bott was making a last ditch effort to explain to Hicks and Moore that they were violating federal law. Moore stated that she did not care and that she was going to keep the boombox in her possession. Hicks stated that all of the passengers around him wished to hear the radio and that he did not care about a "f---ing" fine; in fact, he claimed, he would "buy the f---ing airplane." According to Bott, Hicks' countenance was extremely menacing. Furthermore, Canty "kept turning around and saying things the whole time I kept trying to talk to Miss Moore or Mr. Hicks." Among other things, Canty angrily stated "f--- you bitch" to Bott and told her to leave Hicks, Moore, and Canty alone. Bott also stated that the volume of the boombox was intentionally increased. Without identifying particular passengers, Bott also stated that "[a]t that point everyone around them . . . were laughing" and that someone began to videotape Bott with a portable camera.

Bott and McWilliams testified that, because of the disturbance, for a significant amount of time numerous members of the flight crew were unable to perform their regular duties aboard the aircraft. Bott, McWilliams, and Dubois also stated that they were very much intimidated by Hicks, Moore, and Canty. At one point during her efforts to retrieve the boombox, Bott testified, she felt the need visually to locate fire extinguishers to use in her defense in the event that she was physically assaulted by any or all of the three passengers. Bott also stated that numerous passengers seated around the disturbance has expressed their

fear "that a riot . . . might break out."

Realizing that further efforts to retrieve the boombox would be futile -- short of physical force -- the captain diverted the aircraft's course to Cancun, Mexico, where an unscheduled landing occurred. The captain stated that he was unwilling to order the crew members to attempt to retrieve the boombox by physical force. He was also unwilling to risk the possibility that further radio playing would again interfere with the aircraft's navigational equipment. Upon landing, Mexican authorities removed several passengers from the plane, including Hicks, Moore, and Canty. Canty initially refused to deplane.

It is undisputed that, throughout the flight, none of the appellants committed assault or battery or verbally threatened any Continental flight crew member with physical harm. Rather, according to the testimony of the various members of the Continental flight crew, intimidation resulted solely from appellants' verbal and non-verbal expressive activity -- consisting primarily of appellants' repeated angry and profane remarks, although also including menacing stares, the refusal by Hicks and Moore to relinquish the boombox, and the intentional increase in the boombox's volume by Hicks and Moore. Bott also cited Hicks and Moore's repeated passing of the boombox between themselves after being asked to relinquish it. The Government argues that such intimidating expression, which occupied the attention of numerous members of the flight crew for a significant amount of time and ultimately caused the plane to be diverted to Cancun, is the gravamen of appellants' § 1472(j) violation.

On September 4, 1991, a jury found Hicks, Moore,

and Canty guilty of violating 49 U.S.C. § 1472(j).[2] Sentencing occurred in the following November. Hicks was sentenced to fourteen months imprisonment to be followed by three years of supervised release. Moore was sentenced to eight months imprisonment to be followed by three years of supervised release. Canty was sentenced to four months imprisonment to be followed by three years of supervised release. All three appellants were also each ordered to pay restitution in the amount of $1,871.35 to Continental Airlines, as well as a special assessment of $50.00.

II.

A. The first amendment challenge

Appellants Hicks and Moore [3] claim that their convictions under 49 U.S.C. § 1472(j) are in violation of the free speech clause of the first amendment to the United States Constitution. Appellants specifically claim that the statutes's operative term "intimidate' is overbroad

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2. That provision reads, in pertinent part, as follows:

> (j) Whoever, while aboard an aircraft within the special aircraft jurisdiction of the United States, assaults, intimidates, or threatens any flight crew member or flight attendant (including any steward or stewardess of such aircraft), so as to interfere with the performance by such member of his duties, shall be fined not more than $10,000 or imprisoned not more than twenty years, or both. * * *

For convenience's sake, we shall refer to cockpit crew members, the flight service manager, and all flight attendants as "flight crew members."

3. Appellant Canty raised one issue on appeal: whether the district court erred by failing to instruct the jury that a violation of § 1472(j) was a specific intent crime. *See infra* Part II.D.

> because a person using profanity, which is not specifically [proscribed by] the statute, [but] which is constitutionally protected, could be accused of violating the statute . . . . That is, the [statutes's use of the] word "intimidate" cannot be limited to core criminal conduct but becomes an enforceable ordinance generally prohibiting [profane] speech, which is constitutionally protected . . . . By including . . . the term "intimidate" the statute fails to properly exclude [profane] speech which [is] protected by the First Amendment but which may also cause *intimidation*.

Although this passage from Hicks and Moore's briefs appears to be challenging the statute solely on overbreadth grounds, in reply briefs appellants respond that their "overbreadth challenge is both to the face of the statute, and *as applied* to the facts in this case" (emphasis added).

The Government argues that not only is § 1472(j) not overbroad, but also that "profanity [such as that spoken by appellants] used . . . to intimidate is proscribable speech. . . . It is similar to fighting words and obscenity." The Government proceeds to note, though, that § 1472(j) "proscribes intimidation of crew members that interferes with their duties, not profanity. It is not a content regulation of speech . . . {T}o the extent that it proscribes profanity used to intimidate crew members aboard an aircraft in flight, that proscription is permissible," as merely and "incidental" restriction on speech. At oral argument, however, the Government repeated its argument that profanity in general is not protected speech and, for that reason, appellants have no basis for challenging the statute on first amendment grounds.

We agree with the Government that § 1472(j) does not violate the first amendment, although we do not rely on the totality of the Government's reasoning to reach this result. In addressing this claim, we are required to address both parts of appellants' two-pronged challenge -- that the statute is both overbroad and in violation of the first amendment *as applied* to the facts of the instant case.

i) The overbreadth challenge

Appellants have made a spirited attempt to invalidate § 1472(j) on overbreadth grounds; however, as is evident from the above-quoted passage from their briefs, they have misconceived the overbreadth doctrine, at least as it applies to the instant case. Appellants argue that the term "intimidate: is overbroad in that it effectively criminalizes a form of speech -- simple profanity or vulgarity -- that may well intimidate, but should nevertheless be afforded protection under the first amendment.[4] While such an argument at first blush appears to be an overbreadth challenge, appellants are in fact only making a substantive challenge to § 1472(j) as it applies to intimidating profanity or vulgarity such as that used by appellants. Appellants have not argued that "intimidate" is overbroad in that it may also chill *other* types of protected expression besides profanity.

Appellants fail to realize that the rationale of the overbreadth doctrine is to protect the expressive rights of *third parties* who are not before the court. An overbreadth

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4. We agree with appellants that the profanity generally is protected by the first amendment. However, the statute that appellants are challenging does not criminalize profanity *per se*, but instead criminalized any speech or conduct, which may incidentally include profanity, that intimidates an airline's flight crew so as to interfere with the performance of their duties. *See infra* Part II. A.ii.

challenge is not appropriate if the first amendment rights asserted by a party attacking a statute are essentially coterminous with the expressive rights of third parties. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) (Courts need not entertain an overbreadth challenge "where the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish . . . . There is then no want of a proper party to challenge the statute, no concern that the attack on the statute will be unduly delayed or protected speech discouraged.") *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801-02 (1984) ("[Appellees] have . . . failed to identify any significant difference between their claim that the ordinance is invalid on overbreadth grounds and their claim that it is unconstitutional when applied to their political signs."); *International Society for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge*, 876 F.2d 494, 499-500 (5th Cir. 1989) (citing *Vincent*); L. Tribe *Constitutional Law*, § 12-27 at 1022-24 & n.7.

Even if appellants had argued that § 1472(j) is overbroad because it chills expression other than profanity or vulgarity,[5] we do not believe that such an overbreadth challenge would be viable. The only type of protected speech [6] besides profanity that would have the potential to

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5. According to the Supreme Court in *Vincent*, a party challenging a statute as overbroad has the burden "to demonstrate a realistic danger that the ordinance will significantly compromise First Amendment protections of individuals not before the Court." 466 U.S. at 802; *see also International Society for Krishna Consciousness*, 876 F.2d at 500.

6. We note that profanity should be distinguished from tow somewhat related, but distinguishable, species of non-protected speech -- "fighting words" and obscenity. *See Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words not protected); *Miller v. California*, 413

intimidate a reasonable person would be non-profane invective.[7] Even assuming, without deciding, that § 1472(j) could not constitutionally criminalize such angry non-profane invective, we observe that the statute's potential to criminalize such speech is too insubstantial to permit an overbreadth challenge. "It is clear . . . that the mere fact that on can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Vincent*, 466 U.S. at 800. Rather, a party challenging a statute on overbreadth grounds must demonstrate that there is a "substantial" potential that the overbroad statute will chill third parties' speech. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).[8] We

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U.S. 15 (1973) (obscenity not protected). With reference to remarks made in the instant case, we believe that none rose to the level of "fighting words" or obscenity.

7. For instance, we can hypothesize a scenario in which an intoxicated airline passenger becomes angry at a member of the flight crew because of the crew member's refusal to serve alcohol to the passenger. The passenger could hurl non-profane invective at the crew member, which -- depending on the tenor of the invective -- could intimidate the crew member so as to interfere with the performance of his duties. A similar hypothetical was actually mentioned by the sponsor of 49 U.S.C. § 1472(j) in the United States Senate. *See* remarks of Senator Engle, 107 Cong. Rec. 17170 (August 28, 1961) (hypothesizing scenario of "a drunk quarrelling with a stewardess over whether or not he could keep his bottle.".

8. Unlike the party who successfully challenged a somewhat similar statute invalidated on overbreadth grounds by this court and later by the Supreme Court in *City of Houston v. Hill*, 482 U.S. 451 (1987), *aff'g*, 789 F.2d 1103 (5th Cir. 1986) (en banc), appellants have not offered any proof that there is a realistic and substantial danger that § 1472(j) will be used to chill constitutionally protected speech. In *Hill*, the plaintiff actually documented numerous prior instances where the challenged statute had been used to chill constitutionally protected speech. *See* 789 F.2d at 1113-14 (Appendix to majority opinion.) Appellants have offered

believe that § 1472(j) does not pose a "substantial" threat of overbreadth.

ii) The as-applied challenge

There is still a need to review appellants' first amendment challenge to
1472(j) as applied to the facts of the instant case. As an *initial* matter, we must address the Government's threshold contention that profanity is not constitutionally protected speech. This argument is meritless. The Supreme Court has long held that, as a general rule, simple profanity or vulgarity -- not rising to the level of "fighting words" or obscenity -- is constitutionally protected speech.[9] *See*, *e.g.*,

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no such data.

Our own research of reported cases has revealed that §1472(j) has resulted in relatively few convictions. Of those convictions discussed in reported decisions, the type of activity prosecuted invariably has not been protected by the first amendment. *See* Annotation, Construction and Application of § 902 (i-1), of Federal Aviation Act of 1958, as Amended (49 U.S.C. § 1472(i-1), Punishing Aircraft Piracy, Interference with Flight Crew Members, and Other Crimes Abroad Aircraft in Flight, 10 A.L.R. Fed 844 (& Supp.) (discussing cases); Annotation, Validity, Construction, and Application of Provisions of Federal Aviation Act Punishing Air Piracy and Certain Acts Aboard Aircraft in Flight, or Boarding Aircraft, 109 A.L.R. Fed 488, § 17B (discussing cases). In every reported case in which a § 1472(j) conviction has occurred, the defendant has not simply engaged in "pure speech," whether profane language or non-profane invective, but has also directly threatened, assaulted, or battered a member of the flight crew. *See*, *e.g.*, *United States v. Tabacca*, 924 F.2d 906 (9th Cir. 1991); *United States v. Hall*, 691 F.2d 48 (1st Cir. 1982); *United States v. Meeker*, 527 F.2d 12 (9th Cir. 1975); *Mims v. United States*, 332 F.2d 944 (10th Cir. 1964).

9. By "profanity" or "vulgarity," we refer to words that, wile not obscene, nevertheless are considered generally offensive by contemporary community standards. *Cf. FCC v. Pacifica Foundation*, 438 U.S. at 741

Lewis v. City of New Orleans, 415 U.S. 130 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cohen v. California*, 403 U.S. 15 (1971); *see generally* Tribe, *supra*, §12-10 at 849-56.

Although we disagree with the Government's broad contention about the constitutional status of profanity, we do recognize that general rules do have their exceptions. As the Supreme Court has repeatedly held, first amendment protections are not absolute, even in cases involving "pure speech." *See*, *e.g.*, *Elrod v. Burns*, 427 U.S. 347, 360 (1976) (the proscription on encroachment of First Amendment protections is not an absolute"). In the instant case, we believe appellants' use of angry profanity and vulgarities may be constitutionally criminalized.

We note at the outset of our first amendment analysis that the Supreme Court has traditionally bifurcated its review of statutes challenged on first amendment grounds between cases involving a content-based regulation of speech and cases involving a content-neutral "time, place, or manner" restriction. *See generally* Tribe, *supra*, §12-2, at 789-794. The Court has applied significantly greater scrutiny to content-based regulation, requiring a "compelling' governmental interest to justify the curtailment of speech based on its content and also requiring that the statute be "'narrowly drawn to achieve that and.'" *Simon & Schuster, Inc. v. Members of New York Crime Victims Ed.*, 112 S.Ct.

(discussing humorist George Carlin's "Filthy Words" monologue as qualifying as "indecent" or "profane" language). We note that such words usually refer to "offensive sexual or excretory speech." *Id.* at 743. We also believe that certain other language, at least when used in certain contexts, qualifies as profanity. For instance, with reference to the instant case, we believe that Appellant Canty's angry reference to Ms. Bott as a "bitch" and Appellant Moore's angry admonition that Ms. Bott should get her "ass" to the plane's kitchen qualified as profane.

501, 509 (1992). Conversely, the Supreme Court has been somewhat more deferential to legislative efforts to regulate time, place, and manner of expression -- requiring only a "substantial" governmental interest and "narrow tailoring," so long as such regulations are content-neutral. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791-92, 796 (1989) ("reasonable" regulations on time, place, or manner "only if they are 'justified without reference to the content of the speech'" and if they are "'narrowly tailored to serve a substantial governmental interest'") (citations omitted).

Rather than discriminating against protected profanity or vulgarity, the statute reasonable regulates the time, place, and manner of speech, irrespective of its particular content. The contents of passengers' speech is thus regulated only in an incidental fashion. Only intimidating speech in a quite limited context is proscribed. *See CISPES v. Federal Bureau of Investigation*, 770 F.2d 468 (5th Cir. 1985).[10] In other contexts, profanity -- even if intimidating -- would not go unprotected. *See, e.g., Nash v. State of Texas*, 632 F. Supp.

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10. In *CISPES*, this court was faced with a first amendment challenge to a federal statute that criminalized, *inter alia*, the act of "willfully . . . intimidat[ing] . . . a foreign official in the performance of his duties. " *Id.* at 471, n.2. We held that the statute was not content-based:

> [T]he statute here does not permit the government to discriminate on the basis of the content of expression. To the extent that it applies at all to protected conduct, it is not a restriction on any particular message. It merely proscribes actions of a threatening or intimidating nature directed at any protected official, and First Amendment rights are affected only to the extent that their exercise might serve to create such intimidation . . . ."

Id. at 474.

951, 972-76 (E.D. Tex. 1986) (intimidating language in context of labor strikes is protected by first amendment).

Nevertheless, even is we were to accept appellants' argument that § 1472(j) does discriminate against profane or vulgar language, and thus apply the more stringent analysis required in cases involving a content-based regulation, we would still hold that the statute is constitutional. Assuring the utmost in airline safety is the clear purpose behind § 1472(j). *See United States v. Meeker*, 527 F.2d 12, 14 (9th Cir. 1975) ("[T]he goal which Congress sought in this provision . . . was to deter [acts] which, if committed on the terrain below, might be considered relatively minor, but when perpetrated on an aircraft in flight would endanger the lives of many.") In view of the special context of air travel -- pressurized vessels routinely carrying hundreds of passengers and traveling at speeds of up to 600 miles per hour and 40,000 feet above the ground -- we cannot gainsay that there is a compelling governmental interest for § 1472(j). Congress did not unnecessarily infringe passenger's first amendment liberties to use intimidating profanity. The potential for disaster being so great, even the more mundane duties of flight attendants which implicate safety cannot be taken for granted. Moreover, we note that in the instant case, it was not only flight attendants, but also a member of the cockpit crew whose duties were interfered with by appellants.

We also believe that the statute is narrowly tailored. It does not cast a sweeping net at amorphous catagories of speech. *See, e.g., Gooding v. Wilson*, 405 U.S. 518, 523 (1972) (invalidating statute that proscribed "opprobrious" or "abusive" language). Rather, the statute requires a passenger to "assault[], intimate[], or threaten[] . . . so as to interfere" with a crew member's duties. 49 U.S.C. § 1472(j). "Intimidate," the operative term in the instant case, is a word

that is not simply associated with a type of speech, but includes conduct as well.[11] In fact, it encompasses only a relatively narrow range of speech, which frequently will be a concomitant of intimidating conduct, as in the instant case. Moreover, only intimidating acts or words that actually interfere with a crew member's duties are penalized. Usually only extreme or repeated intimidation -- such as that in the instant case -- will actually have the effect of interfering with a crew member's duties.

We hold that § 14572(j) is constitutional as applied to appellants in the instant case.

B. Vagueness

Appellants have raised a related challenge to the statute as being unconstitutionally vague. This argument is also without merit. We observe that the instant case is not an appropriate one in which to raise a void-for-vagueness challenge. "In a facial challenge to the . . . vagueness of a law[], a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494-95 (1982). If the statute does not proscribe a "substantial" amount of constitutionally protected conduct, a party may raise a void-for-vagueness challenge only if "the enactment is impermissibly vague in *all* of its applications." *Id.* at 495 (emphasis added). As we discussed in connection with appellants' overbreadth challenge, the statute does not reach a "substantial" amount of constitutionally protected conduct. Thus, because § 1472(j)

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11. We note that at least Appellants Hicks and Moore engaged not merely in intimidating speech, but also intimidating conduct. The parties, however, had limited their arguments to the speech elements of appellants' intimidation.

obviously is not impermissibly vague in *all* its applications, appellants' void-for-vagueness challenge must fail. Furthermore, we note that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Id.* at 495 n.7. There is no question that appellants' conduct violated § 1472(j). Nevertheless, we note that the Ninth Circuit, in a void-for-vagueness challenge in which the court actually reached the merits, has upheld § 1472(j). *See United States v. Tabacca*, 924 F.2d 906, 913 (9th Cir. 1991).

C. The definition of "intimidation" in the jury charge

The district court's jury instruction with regard to the term "intimidate," as used in § 1472(j) was as follows:

> In considering whether the actions of the Defendant(s) amounted to intimidation, you are instructed that it is sufficient if the words and conduct of the Defendant(s) would place an ordinary, reasonable person in fear.

Appellants objected to this charge and requested what they claimed was a more appropriate "dictionary" definition of "intimidate" -- to compel or deter by or as if by threats" -- which the district court denied.[12]

Rejection of appellants' argument here requires little discussion. "In reviewing a challenge to a jury charge, we must determine whether a court's charge, as a whole, was a correct statement of the law. When the complaint is that the trial court refused to give a requested instruction, this court

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12. This definition is listed in *Websters New Collegiate Dictionary* (1979), at p. 600, as a part of a larger definition; "[T]o make timid or fearful: Frightful; esp: to compel or deter by or as if by threats."

must determine whether this refusal was an abuse of discretion." *United States v. Sellers*, 926 F.2d 410, 414 (5th Cir. 1991). Our research indicates that the most commonly understood "dictionary" definition of "intimidate' is in fact the one given by the court -- namely, to place a person in fear. Interestingly, this was the *primary* definition listed in *Webster's New Collegiate Dictionary*, the dictionary cited by appellants at trial' appellants requested a more specific, secondary definition. While intimidation may result from words or misconduct that may directly threaten, it is commonly understood that a person may intimidate another without actually making a direct or even veiled threat. Indeed, § 1472(j) uses the terms "threaten" and "intimidate" in the disjunctive.

We also observe that the district court not only instructed the jury correctly on the definition of "intimidate," but actually charged the jury in a way that was considerably more favorable to appellants than the instruction requested by appellants. Appellants' proposed instruction encompassed *subjective* intimidation -- i.e., intimidation that results from another's words or acts, whether or not the intimidated party's perception is reasonable. Conversely, the district court instructed jurors that they could find that intimidation occurred only if a reasonable person would have been intimidated by appellants' words and conduct. [13] The district court did not abuse its discretion.

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13. The district court apparently adopted the objective definition of "intimidate" from that given by the district court in *United States v. Meeker*, 527 F.2d 12, 15 (9th Cir. 1975), a case involving a § 1472(j) violation.

D. General or specific intent?

Appellants[14] contend that a violation of § 1472(j) requires a specific, as opposed to general, intent. Appellants argue that the district court erred by giving only a partial specific intent instruction.[15] We observe that the court's charge essentially tracked the language of the statute, with the exception of requiring that the jurors find that appellants "knowingly" intimidated the crew members. The appellants argue that the district court nevertheless should have gone further and charged the jury that it could convict only if it also found that appellants knowingly intimidated *with the specific intent to interfere with a crew member's duties*. As the charge read, it only required a specific intent to intimidate, not a specific intent to interfere.

The only other court to directly address this issue is the Ninth Circuit. In *United States v. Meeker*, 527 F.2d 12,

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14. This was the only claim raised by Appellant Canty on appeal.

15. The district court's charge regarding the mens rea necessary for a conviction read as follows:

> For you to find the defendant[s] guilty of this crime, you should be convinced that the United States has proved each of the following beyond a reasonable doubt:
>
> * * *
>
> (2) the defendant(s) knowingly and unlawfully intimidated any flight crew member of flight attendant (including any steward or stewardess),
>
> (3) So as to interfere with the crew member(s) or flight attendant(s) performance of their duties, or to lessen the ability of the crew member(s) or flight attendant(s) to perform their duties . . . .

14 (9th Cir. 1975), the court held that § 1472(j) is a general intent crime. *See also United States v. Brice*, 926 F.2d 925, 929 (9th Cir. 1991); *of United States v. Busic*, 592 F.2d 13, 21 (2d Cir. 1978) (49 U.S.C. § 1472(i), a related statutory provision criminalizing air piracy, held to be general intent crime). We agree that § 1472(j) is a general intent crime. The paramount purpose of the statute, as we discussed *supra*, is to ensure that passengers do not impede airline crew members' duties, many of which are critical to the safe operation of the aircraft. As the *Meeker* court explained, "we . . . construe § 1472(j) as a general intent crime, in harmony with the [compelling] statutory purpose of safeguarding flight personnel from any statutorily described acts which would interfere" with their duties. 527 F.2d at 14.

Whether a passenger specifically intends to interfere with those duties is irrelevant. General intent is all that Congress required, as is evident from the plain language of the statute -- in particular, Congress' failure to use a term such as "willfully," "intentionally," or "knowingly," and Congress' selection of the phrase "*so as to* interfere." *See United States v. Lewis*, 780 F.2d 1140, 1143 (4th Cir. 1986) (courts should presume statutes require only general intent "[i]n the absence of an explicit statement that a crime requires specific intent").[16]

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16. Appellant Canty at one point in his brief argues that § 1472 is a strict liability crime, which is disfavored in our law except for minor offenses. *See Morissette v. United States*, 342 U.S. 246 (1952). We disagree that § 1472(j) imposes strict liability. The statute requires intent for the intimidation element of the statute; the statute merely requires no mens rea for the result of the intimidation, i.e., causing interference with crew members; duties. The gravamen of the offense -- for which intent is required -- is intimidation, not interference. Interference with the flight crew is merely an attendant circumstance.

Appellant Canty additionally argues that the court erred in giving the jury an aiding-and-abetting instruction that required specific intent, if the statute itself only requires general intent. This created an impermissible anomaly, Canty argues. We observe that Canty did not object to this aspect of the jury charge. Thus, we can only review this claim for plain error. Fed. R. Crim. P. 52(b). We find no such error. Indeed, if anything, such an instruction was salutary error, which likely benefitted Canty, as it may have led jurors to believe that they could convict Canty only if they found that he possessed a specific intent to violate § 1472(j).

E. Sufficiency of the evidence

Appellants challenge the sufficiency of the evidence supporting their convictions. We begin by noting the familiar standard of review of sufficiency claims, which was articulated by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) -- whether, based on the totality of evidence at trial, and all reasonable inferences therefrom, and in a light most favorable to the Government, a rational juror could find all elements of an offense beyond a reasonable doubt.

i) Whether there was sufficient evidence of "intimidation"?

Appellants Hicks and Moore argue that mere words -- at least words that do not constitute a direct threat -- cannot constitute intimidation. We disagree. As we noted in our discussion of the district court's definition of "intimidate," that term is not synonymous with "threaten." With respect to the evidence presented by the Government at trial, we observe that numerous members of the Continental flight crew testified that appellants intimidated them. In the

environment in which appellants' statements[17] were made -- the closed quarters of an airplane -- the extreme and repeated profanity which they used, when combined with the angry tenor of their words, certainly would intimidate a reasonable person. Appellants' words were not merely indicative of aimless frustration' rather, they evinced extreme anger vis-a-vis particular persons, namely Continental flight crew members. The intimidation was thus likely even greater in Hicks' case.

Finally, we observe that it was not merely words, but also appellants' conduct, that intimidated the flight crew members. We note that Hicks and Moore's repeated refusals to relinquish the boombox after being requested to do so, in combination with their angry declarations that the "f---ing radio [is] going to stay on," certainly would have intimidated a reasonable person. We also observe that the very real threat that appellants would play the radio component of the boombox, which could have caused critical navigational equipment to malfunction, no doubt was intimidating.

ii) Whether there was sufficient evidence of "interference"?

There is ample evidence in the record to support a rational fact-finder's conclusion that appellants interfered with numerous Continental flight crew members duties. There was specific testimony to this extent from Melissa Bott and Carol McWilliams. There was also other evidence indicating that flight crew members, including a member of the cockpit crew, were forced to ignore their duties as a result of the appellants' intimidating words and conduct.

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17. As we set forth in the statement of the facts in *supra* Part I, Appellants Hicks and Moore each engaged in extreme and repeated angry profanity and vulgarity. Appellant Canty has not challenged the sufficiency of the evidence supporting his conviction.

We conclude that there was sufficient evidence t
support appellants' convictions under § 1472(j).

III.

For the foregoing reasons, we AFFIRM ALL thre
appellants' convictions under 49 U.S.C. § 1472(j).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
NOV 29 1991
JESSE E. CLARK, Clerk
By Deputy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

UNITED STATES **JUDGMENT IN A CRIMINAL CASE**
For Offenses Committed On or After November 1, 1967)

V.

Case Number: H-91-00089-02

LA TONYA MOORE
(Name of Defendant)

Bohn E. Phillips
Defendant's Attorney

THE DEFENDANT:
☐ pleaded guilty to count(s)_____
☒ was found guilty on count 1 on September 4, 1991 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense
49:1472(j) and	Aiding and abetting one another to assault, intimidate and threaten flight attendants and crew members so as to interfere with the performance by those attendants

and members of their duties and lessen the ability of those attendants and members to perform their duties.

Date Offense Concluded	Count Number(s)
7-23-90	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)_____ and is discharged as to such count(s).

☐ Count(s) _____(is)(are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $ 50.00 , for count(s) 1 , which shall be due ☒ immediately ☐ as follows: CLERK, UNITED STATES DISTRICT COURT, ATTENTION: Finance, P.O. Box 61010, Houston Texas, 77208.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. UNITED STATES ATTORNEY'S OFFICE, Financial Litigation Unit, P.O. Box 61129, Houston, Texas 77208.

Defendant's Soc. Sec. No.: 466-61-0372

Defendant's Date of Birth: September 17, 1968

Defendant's Mailing Address:
7618 Langley Road
Houston, Texas 77016

Defendant's Residence Address:
7618 Langley Road
Houston, Texas 77016

November 14, 1991
Date of Imposition of Sentence

/s/ illegible
Signature of Judicial Officer
DAVID HITTNER
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

Nov. 26, 1991

Defendant: LA TONYA MOORE Judgment-Page 2 of 4
Case Number: H-91-00089-02

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of EIGHT (8) MONTHS on Count 1

☐ The court makes the following recommendations to the Bureau of Prisons: The defendant is not to be designated and report for incarceration prior to January 6, 1992.

☐ The defendant is remanded to the custody of the United States marshall.

☐ The defendant shall surrender to the United States marshal for this district.

☐ at _____ a.m. on _____
p.m.

☐ as notified by the United States marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

☐ before 2 p.m. on _____.

☒ as notified by the United States marshal.

☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____
_____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: LA TONYA MOORE Judgment-Page 3 of 4
Case Number: H-91-00089-02

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS on Count 1

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

The defendant shall adhere to the Court ordered schedule for payment of restitution.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphamalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant LA TONYA MOORE Judgment-Page 3 of 4
Case Number: H-91-00089-02

RESTITUTION AND FORFEITURE

RESTITUTION

☒ The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
Continental Airlines Attention: Andy Childers, Vice President of Flying 2929 Allen Parkway, Suite 1905 Houston, Texas 77091	$1,871.33

Payments of restitution are to be made to:

☒ the United States Clerk for transfer to the payee(s).
☐ the payee(s)

Clerk
U.S.District Court
Attn: Finance
P.O. Box 61010
Houston, Texas 77208

Restitution shall be paid:

☐ in full immediately.
☐ in full not later than _____.
☐ in equal monthly installments over a period of _____ months. The first payment is due on the date this judgment. Subsequent payments are due monthly thereafter.
☒ in installments according to the following schedule of payments:

Any portion of the sum that remains unpaid at the time of

release from imprisonment shall be paid in equal monthly installments over three (3) years, commencing within sixty (60) days of release. This restitution amount shall not abate at the end of the supervision period following custody or otherwise until the full amount is paid.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

☐ The defendant is ordered to forfeit the following property to the United States:

APPROVED AS TO FORM illegible

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
NOV 29 1991
Jesse E. Clark, Clerk
By Deputy
/s/ illegible

United States District Court
SOUTHERN District of TEXAS

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

V.

Case Number: H-91-00089-01

JIMMY HICKS
Name of Defendant)

Daniel Wannamaker
Defendant's Attorney

THE DEFENDANT:
☐ pleaded guilty to count(s) _____

☒ was found guilty on count(s) 1 on September 4, 1991 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense
49 USC 1472(J)	Aiding and abetting one another to assault, intimidate and threaten flight attendants and crew members

so as to interfere with the performance by those attendants and members of their duties and lessen the ability of those attendants and members to perform their duties.

Date Offenses concluded	Count Number(s)
7-23-90	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $ 50.00 , for count(s) 1 , which shall be due ☒ immediately as follows: CLERK, U.S. DISTRICT COURT, ATTN: Finance, P.O. Box 61010, Houston, Texas 77028

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. UNITED STATES ATTORNEY'S OFFICE, Financial Litigation Unit, P.O. Box 61129, Houston, Texas 77028

Defendant"s Soc. Sec. No.: 460-57-3281
Defendant's Date of Birth: November 3, 1968
Defendant's Mailing Address:

7322 South Hall Street
Houston, Texas 77028

Defendant's Residence Address:

7322 South Hall Street
Houston, Texas 77028

November 14, 1991
Date of imposition of Sentence

/s/ illegible
Signature of Judicial Officer

DAVID HITTNER
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

Nov 26, 1991
Date

Defendant: JIMMY HICKS Judgment-Page 2 of 4
Case Number: H-91-00089-01

IMPRISONMENT

The defendant is hereby committed to the custody o
the United States Bureau of Prisons to be imprisoned fo
term of FOURTEEN (14) MONTHS, as to Count 1 to ru
consecutive to the probation _____,
revocation in Cause No. 490044, in the 209th State Distri
Court.

☒ The court makes the following recommendations to the Bureau of Prisons: None.

☒ The defendant is remanded to the custody of the United States marshal.

☐ The defendant shall surrender to the United States marshal for this district.

☐ at _____ a.m. on _____.
p.m.
☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

☐ before 2 p.m. on _____.
☐ as notified by the United States marshal.
☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: JIMMY HICKS Judgment-Page 3 of 4
Case Number: H-91-00089-01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS, as to Count 1

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

1. The defendant shall adhere to the Court ordered schedule for payment of restitution.

2. DRUG TREATMENT: You shall participate in a program, inpatient or outpatient, for treatment of drug and/or alcohol addiction, dependency or abuse, which may include, but not be limited to urine, breath, saliva and skin testing to determine whether you have reverted to the use of drugs and/or alcohol. Further, you shall participate as instructed and as deemed necessary by the Probation Officer and shall comply with all rules and regulations of the treatment agency until discharged by the Program Director, with approval of the Probation Officer. You shall further submit to such drug-detection techniques, in addition STANDARD CONDITIONS OF SUPERVISION to those performed by the treatment agency, as directed by the Probation Officer.

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72

hours of any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphemalia related to such substances, except as prescribed by a physician;

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit consifcation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

Defendant:JIMMY HICKS Judgment-Page 4 of 4
Case Number: H-91-00089-01

RESTITUTION AND FORFEITURE

RESTITUTION

☒ The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
Continental Airlines ATTN: Andy Childers, Vice President Flying 2929 Allen Parkway Suite 1905 Houston, Texas 77019	$1,871.35

Payments of restitution are to be made to:

☒ the United States Clerk for transfer to the payee(s). CLERK, U.S. DISTRICT COURT, ATTN: Finance, P.O. Box 61010, Houston, Texas 77208

☐ the payee(s)

Restitution shall be paid:

☐ in full immediately.
☐ in full not later than _____.
☐ in equal monthly installments over a period of _____months. The first payment is due on the date of this judgment. Subsequent

payments are due monthly thereafter.

☒ in installments according to the following schedule of payments: Any portion of the sum that remains unpaid at the time of release from imprisonment shall be paid in equal monthly installments over 3 years, commencing within 60 days of release. This restitution amount shall not abate at the end of the supervision period following custody or otherwise until the full amount is paid.

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

☐ The defendant is ordered to forfeit the following property to the United States.

APPROVED AS TO FORM: /s/ illegible

APPENDIX C

U.S. COURT OF APPEALS
FILED
JAN 21 1993
RICHARD E. WINDHORST,JR.,
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-6272

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JIMMY HICKS, JERRY CANTY
and LATONYA MOORE,
Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Texas

ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion DECEMBER 23, 1992, 5 Cir. ___, ___ F.2d __)

(JANUARY 21, 1993)

Before KING, JOHNSON AND DUHE, Circuit Judges.

PER CURIAM:

PER CURIAM:

(x) Treating the suggestions for rehearing en banc, filed by Jimmy Hicks and Latonya Moore, as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

( ) Treating the suggestions for rehearing en banc, filed by Jimmy Hicks and Latonya Moore, as petitions for panel rehearing, the petitions for panel rehearing are DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ illegible
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.